



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interscience Computer Services, Inc.

File: B-228439

Date: February 12, 1988

DIGEST

1. Protest that series of amendments to request for proposals (RFP) was an attempt to "manipulate" RFP's terms to assure award to vendor of mainframe computer for which peripheral equipment was being purchased is untimely, where filed not prior to due date for receipt of proposals, as extended, but only after protester's proposal had been rejected.
2. Rejection of protester's proposal as for the supply of "outdated" automatic data processing equipment was not unreasonable when rejection was consistent with the terms of the solicitation.

DECISION

Interscience Computer Services, Inc., protests the Defense Logistics Agency's (DLA) rejection of its offer to provide certain automatic data processing equipment (ADPE) as not acceptable because it included outdated ADPE. The protester alleges that the contracting officer improperly determined that the equipment was outdated. We deny the protest.

On April 21, 1987, DLA issued request for proposals No. DLAHOO-87-R-0019, requesting that by June 5 offers be submitted for the supply of a fixed disk storage and magnetic tape subsystem to support a Sperry 1100/61 computer system. This protest is solely concerned with certain "minimum [specification] requirements" for the magnetic tape subsystem.

As originally issued, the RFP required with respect to the magnetic tape subsystem that "all equipment delivered shall be in current production by the OEM [Original Equipment Manufacturer]." In response to an industry inquiry, DLA changed the solicitation, through amendments 2 and 3, to provide that:

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". . . Equipment that is out of production by the OEM may be delivered for magnetic tape subsystem control units and features only, if such equipment was in current production by the OEM within 12 months of the closing date of the RFP. All other equipment delivered shall be in current production by the OEM. . . ."

In amendment 5 to the solicitation, DLA recited a number of further vendor inquiries and its answers thereto, and provided offerors with corresponding revisions to the solicitation terms. One of these vendor submissions, a half-page in length, was to the effect that the "in production" requirement for magnetic tape components may preclude an offer from a vendor based on reconditioned but "like new" equipment. In the amendment, DLA not only refused to adopt revised language suggested by that vendor but returned to the requirement as stated in the solicitation as issued: "All equipment delivered shall be in current production by the OEM."

However, in amendment 6 to the RFP, the agency stated that "the requirement that all equipment shall be in current production by the OEM has been changed to shall not be outdated equipment." This change was implemented through the following RFP language:

". . . Equipment delivered shall not be outdated as mandated by the Federal Information Resources Management Regulation (FIRMR), Part 201-24.206 and defined by the FIRMR, Part 201-2.001 as ADPE that is over eight years old (based on initial commercial installation date of equipment) and is no longer in current production. . . ."

In addition, to the solicitation provision concerning used and/or reconditioned equipment the statement "equipment offered shall not be outdated ADPE" was substituted for one requiring equipment "in current production."

The RFP instructed offerors to submit two-part proposals, part I to be a Systems Proposal and Technical Data and part II a Contractual and Cost Proposal. Part I was to include detailed information about the equipment proposed.

In its offer, which was only for the magnetic tape subsystem, Interscience identified by make and model number the major components it intended to supply which, it said, it:

". . . deemed to satisfy the FIRMR requirement as not outdated. The equipment is currently being remanufactured . . . and is certified as like new. . . . Additionally it is certified that all Engineering Changes have been applied. . . ."

Included in the protester's offer was a "Product Description Manual" which had a copyright date of 1975.

After reviewing the initial proposals received, DLA asked Interscience for certain clarifying information about its proposal. Among other things, DLA repeated verbatim the language of amendment 6 concerning outdated equipment and asked Interscience to "provide documentation as to the date of initial commercial installation of the proposed equipment."

In response, Interscience did not provide the documentation which DLA had requested. Instead, Interscience replied:

"The equipment proposed by Interscience will consist of units which will have been manufactured at an engineering release level consistent with the FIRMR requirement that initial commercial installation dates of these units will not exceed eight (8) years. Documentation as to the initial commercial installation dates of the specific units to be supplied in response to an award against this solicitation will be made at the time of contract award and delivery date definition. As previously stated, the FIRMR eight year stipulation will be met."

DLA considered this response insufficient to permit it to determine whether the equipment which the company proposed to furnish was "outdated" under the terms of the RFP. The contracting agency then directly contacted the OEM whose remanufactured equipment Interscience had proposed to supply and was advised by the OEM that the tape controller and tape drive in issue were first introduced commercially in 1974.

Based on the data available to him, the contracting officer determined that the protester's proposal was unacceptable because it was for the supply of outdated equipment and so informed the protester by letter of September 10.

On September 17, 1987, Interscience filed a preaward protest with the contracting officer contesting his rejection of Interscience's proposal, contending he had "disregarded" the information contained in Interscience's "clarification," quoted above. In its agency-level protest, Interscience

also stated that it had set aside for delivery under this contract specific units, none of which would have had an initial commercial installation date prior to 1982.

Following receipt of Interscience's agency-level protest, the contracting officer contacted the Information Resource Management Service of the General Services Administration, and spoke with officials in the Policy Branch and the Authorization and Management Reviews Branch. The contracting officer states that he was told that the decision relative to whether equipment is outdated under the FIRMR should be based upon make and model number, not engineering releases. The contracting officer again contacted the manufacturer of the equipment and was told that the equipment, which was built from 1974 to 1984, was not currently in production; however, the equipment was the subject of more than 300 engineering changes of which three between 1982 and 1985 were identified as significant. Upon investigating the enumerated significant changes, the contracting officer found that the first one merely combined all prior changes; the second one fixed a channel interference problem; and the final one improved the tape loading procedure. He determined that none of these was a significant technological enhancement. Accordingly, he denied the preaward protest. Interscience then protested here.

The protester essentially argues that DLA, motivated by a desire to make award to Unisys, the vendor of the central processing equipment to which the magnetic tape subsystem will be attached, "contrived" to eliminate competition by "manipulating" the RFP requirements through the series of amendments described above. In finally settling on the FIRMR prohibition against acquiring outdated ADPE, Interscience argues, DLA not only has relied on a regulation which does not apply to the procurement of peripheral equipment such as magnetic tape subsystems, but has misinterpreted the 8-year requirement. As a result, the protester asserts, its proposal was improperly rejected.

To the extent that Interscience is objecting to the terms of DLA's solicitation, the protest is untimely and not for consideration on the merits. The question of the permissible age of the magnetic tape subsystem to be supplied was not an obscure one. It was a subject of four solicitation amendments, at least two of which appear to have been made in response to inquiries from unidentified vendors, one of whom if not Interscience itself was a firm with similar concerns. If Interscience thought the solicitation, particularly amendment 6, objectionable because it adopted a FIRMR standard inappropriate to this procurement or had the practical effect of unduly restricting competition to a single vendor, then Interscience should have

protested the terms of the RFP prior to the due date for receipt of initial proposals, as extended. 4 C.F.R. § 21.2(a)(1) (1987); JoaQuin Manufacturing Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 1/ It did not do so. We will examine, however, Interscience's protest of the rejection of its proposal since it was timely filed.

Under FIRMR, 41 C.F.R. § 201-24.206 (1987), outdated ADPE, and ADPE that is no longer being installed by the commercial market, should not be acquired unless it would be cost effective. Such ADPE is outdated if it "is over eight years old (based on the initial commercial installation date of the equipment) and is no longer in current production." FIRMR, 41 C.F.R. § 201-2.001.

There is no dispute that the make and model equipment offered by Interscience is out of production and, according to information obtained by DLA from the OEM, was first introduced commercially in 1974 and manufactured by that firm for 10 years thereafter. The FIRMR defines the 8-year-old requirement in terms of "the initial commercial installation date of the equipment" (emphasis added) which DLA states it properly applied, as subsequently confirmed by that office at GSA responsible for the promulgation of the FIRMR, on a make-and-model basis. Its view is that this equipment was not significantly changed over its production life and that the protester's offer, in effect, is one to provide 1974 technology. Since the make and model equipment offered by the protester was initially installed commercially in 1974, DLA concluded that it was "outdated" as defined by amendment 6 to the solicitation and the protester's offer therefore was unacceptable.

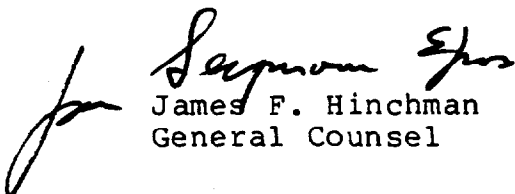
The protester asserts that the 8-year-old requirement should apply not on a make-or-model basis, but only to those specific units which it would supply under any resulting contract, as to which it proposed to "remanufacture" units of indeterminate age "to an engineering release level consistent with the FIRMR requirement that initial

1/ We note that Interscience's protest position that the FIRMR provisions referenced in amendment 6 are inapplicable to the type of equipment here being purchased is somewhat inconsistent with its proposal, in which it not only did not object to these provisions but asserted that its proposal was "consistent" with them.

commercial installation dates of these units will not exceed eight (8) years."2/

We conclude that DLA did not unreasonably reject the protester's proposal. Its action, taken only after the protester had refused the agency's request to "provide documentation as to the date of initial commercial installation of the proposed equipment," was consistent with the terms of the RFP. As DLA notes, the FIRMR provision referenced in the solicitation speaks only of the "initial" commercial installation of the equipment and not of engineering releases made during the production run of a specific make and model.

The protest is denied.


James F. Hinchman
General Counsel

2/ Interscience's proposal quoted on pages 2 and 3 above appears to reserve to it the option of selecting used equipment of the make and model proposed, of any vintage as far back as 1974, and remanufacturing it to the original equipment manufacturer's standards of 8 years ago. Interscience specifically refused to reveal to DLA, prior to award, the actual dates on which the equipment it would supply was first installed commercially. In its protest, but not in its proposal, Interscience further stated that it had set aside for delivery under this contract specific units which had been initially installed commercially in 1982 or later. Even this would not be acceptable under the terms of the RFP.